(2)

No. 07-18

In The Supreme Court of the United States

John A. Whitaker,

Petitioner,

v.

WASHINGTON,

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Washington

BRIEF IN OPPOSITION TO CERTIORARI

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JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The petitioner was a member of a gang who called themselves the Northwest Mafia. Their purpose was to obtain money primarily through stealing from drug dealers. The gang also included Matthew Durham, Maurice Rivas, John Anderson, Yusif Jihad, Jeff Barth and Tony Williams. TR 524-530, 1025-1031, 1432-1435.

The petitioner, Anderson, and Jihad developed the belief that Rachel Burkheimer had set them up to be injured by a rival. Anderson and Jihad devised a plan to lure her to Jihad's home. Whitaker and other gang members were present when Burkheimer arrived. As she tried to leave, Anderson threw her to the ground and Whitaker kicked her. Anderson and Whitaker then bound her with duct tape. She was eventually taken to the garage where she was held for several hours. TR 540-552, 755-757,765-772, 803-804, 1049-1050, 1060-1063, 1216-1217, 1477-1478.

Rivas arrived while Ms. Burkheimer was being held in the garage. Once Rivas was there Jihad explained to him what had happened, including the fact that Whitaker had participated by kicking and binding Ms. Burkheimer. Jihad told Rivas that he was "in it now." The gang members discussed various plans for Ms. Burkheimer including holding her for ransom. TR 555, 776, 1064-1077, 1219-1221.

Jihad lived with his girlfriend Trissa Conner. Eventually Ms. Conner came home. When she learned Ms. Burkheimer was being held captive in her garage, Ms. Conner first threatened to call the police. She then ordered everyone out of the house. Gang members rapidly prepared to leave. Whitaker and Anderson used a large gym bag to conceal Ms. Burkheimer as they carried her out of the house. Whitaker, Rivas, and Durham then drove away with Ms. Burkheimer concealed in the bag in the back of their Jeep. TR 867, 877, 884-891, 970, 1089-1093.

Eventually Whitaker called Anderson and Jihad. After speaking to them, Whitaker directed Durham to pull over to a wooded area. He ordered Rivas to stay with Ms. Burkheimer until they returned. Whitaker and Durham returned to Jihad's duplex where Anderson joined them with shovels and picks. The three men then returned to retrieve Rivas and Ms. Burkheimer. TR 792-796, 1097-1106, 1110.

The four men drove Ms. Burkheimer up to a secluded spot. Whitaker, Anderson, and Rivas dug her grave. Ms. Burkheimer was ordered out of the bag. She was told to remove all her clothing and jewelry and get in the grave. Whitaker collected Ms. Burkheimer's things and then placed them in a bag, which they later attempted to destroy. Anderson then shot Ms. Burkheimer to death. TR 806, 820, 1115-1128, 1228-1235.

Several days later police found Ms. Burkheimer's body. When they found out, Jihad, Whitaker and Barth fled to Los Angeles. There they were arrested for the murder. Jihad made a statement to police, including the fact that Whitaker had kicked and bound Ms. Burkheimer after Anderson had attacked her. TR 730-743, 1203-1204, 1209-1211, 1494-1495, 1503-1506.

The petitioner was incarcerated prior to trial. While awaiting trial the petitioner struck up a friendship with another inmate, Christian White. The petitioner told White about his involvement with Ms. Burkheimer's death, including the fact he had kicked and bound her during the course of the kidnapping. TR 1564-1566, 1573-1578.

At trial the State sought to introduce evidence through Rivas that Jihad had told Rivas what Whitaker had done before Rivas had arrived. Rivas testified that Jihad told him that Whitaker had kicked Rachel and bound her after Anderson knocked her down. The court considered the motion outside the presence of the jury. The trial court found the petitioner was part of a conspiracy to kidnap and murder Ms. Burkheimer, and Jihad's statements were made in furtherance of that conspiracy. The court relied on evidence that had already been introduced, the testimony of White which had been ruled admissible, and Jihad's statement to police. The court then ruled the evidence was admissible. TR 1200-1212.

The petitioner was convicted of Aggravated First Degree Murder and Conspiracy to Commit Murder First Degree for the kidnap and murder of Rachael Burkheimer.

REASONS FOR DENYING THE PETITION

A. The Petitioner Did Not Raise The Issue To The Highest Court Of The State In Which A Decision Could Be Had.

The Supreme Court may review "final judgments or decrees rendered by the highest court of a State in which a decision could be had," where a claimed right or privilege is specially set up or claimed under the Constitution. 28 USC §1257(a). Here the

petitioner failed to present the precise issue on which he now seeks certiorari before the Washington State Supreme Court.

The petitioner briefed three arguments related to his Confrontation Clause claim in the Washington State Court of Appeals. He first argued the trial court erroneously concluded that a conspiracy exited and that the petitioner was part of that conspiracy. Second, he argued the trial court used the wrong evidentiary standard to determine if a conspiracy existed. Finally, he argued Jihad's statements regarding the petitioner kicking and binding Ms. Burkheimer was testimonial hearsay in violation of Crawford v. Washington, 541 U.S. 36 (2004).

The Court of Appeals addressed each of these three arguments and rejected them. The Court noted Jihad's statements to police were not admitted at trial, and his statements to Rivas were admissible as statements in furtherance of a conspiracy. For the first time at oral argument the petitioner argued that the trial court violated Crawford by relying on Jihad's statements to police to determine whether his statements to Rivas were admissible. The Court of Appeals declined to consider this issue because he had provided no authority for his late-adopted position. App. 23-26 to petitioner's brief.

The petitioner then petitioned for review to the Washington State Supreme Court. He did not raise any of the Confrontation Clause issues he had briefed in the Court of Appeals. Rather he sought review of the issue which the Court of Appeals declined to consider. He framed the issue as "The Trial Court Allowed the State to Use Statements Otherwise Inadmissible under Crawford to Justify Admitting the Statements of Alleged Co-Conspirators to Prove a Conspiracy." The State Supreme Court denied the petition for review.

In order to for this Court to review a decision from a State court, that decision must be final in the sense that it is not subject to further review or correction in any other state tribunal. Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 81 (1997). Where a petitioner has not asked a State Supreme Court to review a judgment entered by the Court of Appeals of that state, the decision of the Court of Appeals does not qualify as a final judgment, and this Court lacks jurisdiction to review the issue. Banks v. California, 395 U.S. 708 (1969). Even though review by the Washington State Supreme Court was discretionary, the petitioner was obligated to raise the issue he seeks this Court to review with the State Supreme Court first. Matthews v. Huwe, 269 U.S. 262, 265 (1925), Stratton v. Stratton, 239 U.S. 55 (1915).

Here the petitioner did not follow that procedure. The issue raised in is petition is essentially the same Crawford issue he fully litigated in the Washington State Court of Appeals. However, because it was not the issue raised in the Supreme Court, that court had no opportunity to decide the issue he now asks this Court to decide. This Court has refused to consider issues not fully litigated in the highest court of a state in which a decision could be had. Illinois v. Gates, 462 U.S. 213, 223 (1983). Because the petitioner did not give the Washington State Supreme Court the opportunity to consider the issue presented here, this Court should deny his petition for lack of jurisdiction.

B. The Decision Of The Washington State Court Of Appeals Does Not Conflict With Decisions Of The Second Circuit Court Of Appeals Because Each Case Addressed Different Factual Circumstances.

Even if this Court accepts the petitioner's claim that this Court has jurisdiction to hear his case, the decision of the Washington Court of Appeals is not in conflict with decisions from

the Second Circuit Court of Appeals. Here the Court of Appeals confirmed the trial court's determination that Jihad's statements to Rivas were made in the course of and in furtherance of a conspiracy to hold Ms. Burkheimer against her will and thus were admissible into evidence. App 26 to Petitioner's brief. This holding is consistent with this Court's decision in Crawford, 541 U.S. at 56 which said statements made in furtherance of a conspiracy are not testimonial.

The petitioner argues the Court of Appeals held that co-conspirator statements can never be testimonial pursuant to Crawford. He then argues this statement conflicts with United States v. Logan, 419 F.3d 172 (2nd Cir. 2005), cert denied, 126 S.Ct. 1067 (2006): and United States v. Stewart, 433 F.3d 273 (2nd Cir. 2006). The petitioner's position fails because the Court in his case addressed only the facts presented to it and did not attempt to address all possible circumstances. The courts in Logan and Stewart addressed the specific facts in those cases, and they are significantly different than those in petitioner's case.

Unlike the petitioner's case, the statement introduced into evidence in both Logan and Stewart was made to investigators or police who were investigating criminal activity. This fact is important in light of Davis v. Washington, 126 S.Ct. 2266 (2006). There this Court said statements to law enforcement personnel are "testimonial" under Crawford when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions." Davis, 126 S.Ct. at 2274.

Unlike the statements at issue in either Logan or Davis, the statements at issue here were not made to police. Further, they were not intended to prove a past event that could relate to a future criminal prosecution. Rather, those statements were to another

person called in to participate in the crime. Courts have ruled similar statements were properly admitted because they furthered the conspiracy. United States v. Townley, 472 F.3d 1267, 1273 (10th Cir. 2007) citing United States v. Smith, 833 F.2d 213, 219 (10th Cir. 1987). (Statements which inform others of the current status of the conspiracy are "in furtherance" of the conspiracy), United States v. Yarbrough, 852 F.2d 1522, 1536 (9th Cir. 1988) (statements made to keep coconspirators abreast criminal acts committed by other coconspirators were in furtherance of a conspiracy.)

The defendant attempts to sidestep these differences by arguing Jihad described the completed crimes of assault and unlawful imprisonment. He argues that Davis stands for the proposition that statements made to non-law enforcement personnel are testimonial if they recount criminal events. The discussion in Davis that he relies on relates to circumstances under which the non-testifying declarant is a witness, not a coconspirator. Davis, 126 S.Ct. 2277. Davis and other cases which have followed Crawford have repeatedly reaffirmed that statements made in the course of and in furtherance of a conspiracy are not testimonial. See United States v. Delgado, 401 F.3d 290, 299 (5th Cir 2005), United States v. Bridgeforth, 441 F.3d 864, 869 n.1 (9th Cir 2006), United Sates v. Hansen, 434 F.3d 92, 100 (1st Cir 2006) cert denied, 127 S.Ct. 203 (2006), United States. v. Underwood, 446 F.3d 1340 (11th Cir. 2006), cert. denied, 127 S.Ct. 225 (2006)

The petitioner does not challenge the Court of Appeals determination that the evidence showed there was a conspiracy to hold Ms. Burkheimer against her will, petitioner was a member of that conspiracy, and Jihad's statements were made in furtherance of that conspiracy. He simply ignores the Court's holding. The facts determined by the Court of Appeals should not be ignored because they provide the foundation for admissibility of those

statements. As discussed, coconspirator statements made to coconspirators during the course of a conspiracy are not testimonial.

In contrast, the facts in the cases the petitioner cites from the Second Circuit justified a different result. In Logan the challenged statements from the co-defendant were admitted to corroborate the defendant's statement and the statements of other witnesses. They were not admitted for the truth of the matters asserted, and thus were not hearsay. Therefore, the Confrontation Clause was not violated. Logan, 419 F.3d at 178. Logan did reject the government's alternative argument that the statements were admissible as statements of a coconspirator. The Court confirmed that statements made by coconspirators in furtherance of a conspiracy were not testimonial. However, the Court distinguished that case on its specific facts; the statements in issue were made to police, and thus subject to Crawford's restrictions. Logan, 491 F.3d at 179.

Stewart characterized this latter discussion as dicta and distinguished it on its facts. Stewart, 433 F.3d at 293 n. 3. There the Court was faced with the question of whether coconspirators' truthful statements to investigators were admissible along with their untruthful statements when the parties were engaged in a conspiracy to obstruct an investigation. The Court held those truthful statements were testimonial. However, because those statements were designed to lend credence to false statements, and hence advance the conspiracy, they were admissible. Stewart, 433 F.3d at 292-293.

Just as Logan and Stewart addressed the particular facts presented in each of those cases, the Court of Appeals addressed the particular facts presented here. Each applied the same standard set out in Crawford and Davis to the facts presented to each court.

There is no conflict between the cases because of those factual differences. The petition should be denied because the petitioner has not credibly demonstrated that the decision of the Washington Court of Appeals is in conflict with either a decision of the Second Circuit Court of Appeals or this Court.

C. This Case Does Not Present Compelling Facts For Review Because Even If Error Had Been Committed, Introduction Of The Challenged Statements Were Not Critical To The Petitioner's Conviction.

The Washington Court of Appeals noted that any error in admission of Jihad's statements regarding the petitioner to Rivas would be harmless. The Court of Appeals relied on the fact that Rivas's testimony was duplicative of Williams and White's testimony. App. 25. The petitioner challenges this conclusion, arguing those witnesses was not credible. The challenge is purely speculative, however. Williams's overall testimony was corroborated by the other testifying coconspirators. There was no evidence that White and Williams knew each other. White also testified that Whitaker had admitted he arranged an alibi with another coconspirator. This testimony was confirmed by Rivas and Tyler Dockendorf, who acted as a courier between Whitaker and Rivas. TR 1244-1247, 1309-1315, 1579-1581.

Contrary to the petitioner's claim, no other jail inmate testified that he saw White going through the petitioner's legal papers before contacting police. The only reference to that suggestion came during a pre-trial hearing on the admissibility of his testimony when defense counsel asked White if he knew why an inmate named Marvin Nickell would say that White had done so. White stated he had not looked at the petitioner's legal papers and did not know why Nickell would say he did. Pre-trial TR (5/26/04) 210, 213-214. Nickell never testified at trial.

Additionally, the petitioner's claim that White received consideration on his own case in exchange for his testimony is unsupported by the record. TR 1567-1573.

Any error was also harmless because the evidence presented at trial overwhelmingly established the petitioner acted as an accomplice to the kidnapping and murder of Rachel Burkheimer from the beginning to the end. Durham confirmed the petitioner was present and aided in carrying Ms. Burkheimer into the garage after Anderson assaulted her. Durham and Rivas both testified Whitaker helped carry Ms. Burkheimer out of the garage and into the Jeep. Both said Whitaker directed where they went until they returned to pick up Anderson. Both confirmed Whitaker fully participated in digging Ms. Burkheimer's grave, carrying her to her grave, and taking her belongings from her before Anderson shot her. Both stated Whitaker helped bury Ms. Burkheimer and get rid of incriminating evidence. This evidence was corroborated by White's testimony recounting the petitioner's detailed admission of his part in Ms. Burkheimer's kidnap and murder. TR 1573-1578.

Considering the totality of the evidence the Court of Appeals correctly concluded that if any error occurred, it was harmless. Even if the petitioner's position had merit, this case does not present the best facts under which to decide the issue he raises. The evidence he complains was erroneously admitted had little impact on the outcome of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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